Filed 2/11/09 Schmidt v. Webb CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GEORGE SCHMIDT, Plaintiff and Respondent, v. TREVOR WEBB, Defendant and Appellant.	B200508 (Los Angeles County Super. Ct. No. BS085072)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed.

Law Offices of Barry P. King, and Barry P. King, for Defendant and Appellant.

Law Offices of Jeffrey F. Sax, and Jeffrey F. Sax, for Plaintiff and Respondent.

Respondent George Schmidt obtained a judgment against his former employer Rubber Technology International, Inc. (RTI) for unpaid wages. Appellant Trevor Webb, president of RTI, appeals from an order amending the judgment to add him as an additional judgment debtor under an alter ego theory. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Underlying Claim*

From October 1, 1996 through December 15, 2001, Schmidt was chief financial officer for RTI. For a brief period thereafter, until January 31, 2002, he worked for the company as an accountant. In late 2002, he brought a claim for unpaid wages in an administrative hearing before the Labor Commissioner. RTI, appearing through Webb, contested the claim. The hearing officer ruled in favor of Schmidt. In June 2003, judgment was entered against RTI based on the Labor Commissioner's order in the amount of $171,837.32, including interest, costs and penalties.

B. *First Motion to Amend Judgment*

Several months after judgment was entered, Schmidt successfully brought a motion to amend the judgment to add another entity, Integrated Financial LLC (IF), as an additional judgment debtor. Schmidt's motion was based on evidence establishing that in February 2002, RTI leased its facilities and operations to an unrelated entity (Recovery Technologies Group of California) in exchange for substantial monthly lease payments.

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1 This is the second time this case has been before us. Many of the facts in the summary are taken from our prior opinion.

Webb and his wife, Anne Gogstad, arranged through a series of transfers to have the lease payments assigned to IF, which had been incorporated by Webb and Gogstad to manage RTI's revenue and to protect its income stream from creditors, lienholders and judgments. The evidence indicated that Webb and Gogstad were using the lease income assigned to IF to pay RTI's debts, including underlying equipment leases, ongoing legal and accounting fees and settlement of outstanding debts, essentially allocating the assets at their discretion.

In his first motion to amend the judgment, Schmidt also sought to add Webb and Gogstad as additional judgment debtors. However, the trial court denied the request with respect to them because there was no evidence that they were personally benefiting from the transfer to IF.[2]

C. *Second Motion to Amend Judgment and Prior Appeal*

In May 2005, approximately two years after the original judgment was entered, Schmidt file a renewed motion to amend the judgment to add

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[2] With respect to IF, the court explained: "It is apparent to me . . . that when one boils down what has occurred, [Webb] controlled the activities of [RTI]. [Webb and Gogstad] own and control [IF] . . . . And under Webb's direction, [RTI] assigned its sole revenue producing asset, which is the lease with [the unrelated party], either directly to [IF], which is controlled by [Webb and Gogstad], or to [Webb and Gogstad] themselves, who apparently had assigned it to [IF]. . . . Now, where that leaves me is as follows: It appears to me [IF] is a successor entity, albeit a limited liability corporation of [RTI]. It is conducting the same business. [RTI's] sole revenue producing asset was the lease. [IF] now controls the lease. It is the same as [RTI]." With respect to Webb and Gogstad, however, the court stated: "I accept [Webb and Gogstad's] representations as to their motivation as to why they were doing this, which is in essence to manage the asset and attempt to themselves allocate assets among the various [creditors]. And in my view that's sufficient to defeat the equitable notion of alter ego with respect to them . . . ."

Webb and Gogstad. In the intervening period, Schmidt had obtained the financial records of RTI and IF and, based on his review, concluded that a substantial portion of the entities' income -- several hundred thousand dollars -- was either unaccounted for or had been diverted to Webb and Gogstad. The trial court denied the motion on two grounds: (1) Schmidt had not been sufficiently diligent in seeking to add Webb and Gogstad; and (2) the financial records and Schmidt's declaration summarizing them constituted hearsay.

Schmidt appealed the denial of the renewed motion, and by opinion and order dated November 14, 2006, this court reversed. We concluded that the trial court erred in excluding on hearsay grounds business records produced under subpoena and authenticated by the producing companies and Schmidt's summary of the business records. We further concluded that Schmidt's failure to bring the renewed motion to add Webb and Gogstad earlier did not constitute a lack of diligence, because the evidence was not and could not reasonably have been available in time for the original hearing. Moreover, the time between Schmidt's receipt of the records and the filing of the motion did not establish a lack of diligence in reviewing the records.

D. *Proceedings After Remand*

Upon remand, the trial court reconsidered the motion to add Webb and Gogstad based on the original papers, without supplemental briefing. A summary of the evidence presented in conjunction with the original moving and opposition papers follows.

1. *Moving Papers*

Based on his review of the financial records of RTI and IF, Schmidt presented evidence that between February 2002 and March 2004, the two entities received the following income totaling $830,640: (1) lease income from the unrelated third party in the amount of $614,690; (2) funds from the 2004 sale of a rasper machine in the amount of $138,000; and (3) "additional income" of $77,950.[3]

During this same period, the records reflected that RTI and IF disbursed a total of $606,636 toward expenses which appeared legitimate. In addition, the following disbursements -- deemed suspicious by Schmidt -- were made: (1) $86,266 paid directly to Webb and/or Gogstad; (2) a disbursement of $6,825 to reimburse Webb and Gogstad for paying the accountant, Fred Maidenberg, who prepared their personal income tax returns and the tax returns for their separate business, S.O.S. Sportswear, Inc. (SOS); (3) $5,929 to a credit card account held in the name of SOS; (4) $8,846 to Extreme Performance Products, a company owned by Webb's brother; (5) $845 to Michael Barre, a relative of Webb's; and (6) $5,500 to a hospital in Phoenix where a victim of the automobile crash that killed Webb's father had been a patient.[4]

Schmidt also reviewed bank records showing a total of $358,597 in cash removed from RTI's accounts from April 2002 to April 2003, but found nothing in his review of the financial records to justify how that money was spent.

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[3] Schmidt did not identify the source or nature of the "additional income."

[4] Raymond Webb, Webb's father and the former president of RTI, was killed in an automobile accident in 2000.

Two other parties submitted declarations in support of the motion to amend the judgment. The president of the entity that purchased a shredder from RTI submitted a declaration stating that he had given Webb a cashier's check payable to RTI in the amount of $20,000 on June 14, 2004.[5] A representative of Soris Financial, the entity that held a lien on the shredder, submitted a declaration in which he stated that as of March 2005, those funds had not been transferred to Soris Financial.

2. *Opposition*

Declarations in opposition to the motion to amend the judgment were submitted by Webb, Gogstad, Tom Reichman, RTI's former chief operating officer, and Martin Fort, an accountant.

According to Webb, the cash removed from RTI's accounts was used to buy cashier's checks to pay creditors, as RTI was not using its own checks for a period of time.[6] Webb claimed that none of the cashier's checks was paid to him or Gogstad.

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[5] Schmidt presented evidence that at Webb's judgment debtor examination four days later, on June 18, 2004, Webb denied RTI had sold any piece of equipment other than the rasper.

[6] Webb prepared an exhibit which purported to show all revenues and expenses from June 2002 to June 2003, apparently the period in which cash was withdrawn and payments to creditors made by cashier's checks. We note it does not precisely conform to the April 2002 to April 2003 period discussed in Schmidt's declaration.

The exhibit stated that RTI began June 2002 with $135,000 in lease revenue, including an initial payment of $102,000 and two $11,000 monthly installments for April and May 2002. According to the exhibit, RTI ran a negative balance from July 2002 to March 2003, had a few months of positive cash flow because Webb and Gogstad personally paid a number of outstanding bills, and ended the period with a negative balance of over $18,000.

Webb stated that the lease payments from the unrelated third party ceased in March 2004. After the lease payments ended, Webb began to sell RTI's equipment in order to pay off the equipment loans and wind down the business. Webb stated that when he sold the shredder, the funds ($20,000) were remitted to Soris Financial, to repay a loan made on the machine.[7] RTI still owed Soris Financial money on the loan, and Webb was attempting to settle the matter for an additional $100,000. According to Webb, the entire payment for the rasper was wire transferred to the lien holder to repay a loan made on the machine.[8]

Webb also attempted to justify some of the other disbursements uncovered by Schmidt and discussed in his declaration. Webb explained that Extreme Performance, although owned by a relative, had performed engineering and repair work for RTI.[9] Michael Barre performed computer services for RTI, including securing its domain name.[10] The amount paid to the hospital was for the medical care for the surviving passenger of the automobile accident in which Webb's father died and was made allegedly to avoid a claim against RTI by the passenger. The officers of RTI had jointly agreed to pay this bill.

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7 As noted in our prior opinion, payment was apparently made to Soris Financial sometime after March 2005.

8 Attached documentation showed $134,000 received for the sale of the rasper and a payment of $117,500 to Vineyard Bank.

9 According to the attached documentation, the services were provided and payments were made in 2000 and 2001.

10 Barre submitted a declaration stating he provided on site computer repair, web design services and Web site maintenance.

Webb admitted that he and Gogstad had received payments from RTI, but stated those payments were to reimburse them for funds expended on RTI's behalf. Webb stated he had personally paid $265,000 to Maidenberg, the accountant who prepared tax returns for SOS, to settle a case Maidenberg brought against RTI and against Webb personally, and the $6,825 payment was to partially reimburse Webb for that settlement contribution. The payment to the SOS credit card account was allegedly to reimburse Webb for RTI expenses that he advanced.

Reichman, RTI's former COO, confirmed that (1) the officers of RTI agreed to pay the hospital expense for the surviving passenger of Raymond Webb's automobile accident, (2) Extreme Performance was a regular vendor of RTI's, and (3) Michael Barre performed computer and internet related services for the company.

Fort, the accountant, submitted a declaration stating that Schmidt had failed to include certain expenses in his summary of RTI's income and expenses, including: "$5,000 office expense, $12,775.93 legal fees, $1,600 unsecured creditor payments, $45,000 consultant fees, $30,000 permit penalties, $116,000 payoff due on rasper machine, $7,014.06 taxes, $2,380 utilities, and $82,879.13 [citation] payroll taxes, penalties and interest." These expenses totaled $302,649.12. Fort stated that based on his examination of the bank records for RTI and IF, those entities had made one payment to Webb in the amount of $4,806.87 and four payments to Gogstad totaling $28,424.55, all for reimbursement of expenses.

Gogstad stated in a declaration that she had personally paid on RTI's behalf $19,000 to the IRS in August 2002 and $6,600 to Southland Business Bank in July 2003 and had, in addition, deposited $1,000 into RTI's bank

account in October 2003. She subsequently received reimbursements from RTI for those amounts.[11]

3. *Reply*

In his reply, Schmidt said he included $7,014.06 in taxes and $12,775.93 in legal fees when he calculated RTI/IF's income and disbursements, contrary to Fort's declaration. In addition, Schmidt pointed out that Webb had submitted no copies of cashier's checks to substantiate his claim that legitimate expenses were paid by RTI via cashier's checks, and noted that the $45,000 consultant fee had not been properly documented.[12] He further noted that the $5,000 in "office expenses" referenced by Fort went to an entity with which Webb and Gogstad were associated. In addition, Schmidt disputed Fort's claim that RTI had incurred $82,879.13 in payroll taxes. This amount, Schmidt claimed, was paid by Webb personally because Webb was personally liable. Schmidt further stated that the financial records produced reflected that some of the amounts paid to Webb and Gogstad ($57,000 to Webb and $24,000 to Gogstad) was for "'accrued salary.'" Finally, Schmidt submitted a declaration from Maidenberg, stating that the $6,825 payment he received was for accounting services rendered to Webb and Gogstad -- not RTI -- and was not a contribution toward settlement of a lawsuit against RTI.

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[11] Gogstad, Webb and Reichman stated in their declarations that Gogstad had no involvement in the operation of RTI.

[12] The documentation provided consisted of a letter and fax written in 2005 to justify a payment made in 2002.

4. *Trial Court's Ruling*

The trial court granted the motion to amend the judgment to add an additional judgment creditor with respect to Webb and denied it with respect to Gogstad. In its order, the court made particular reference to the following evidence: "Schmidt notes that Webb and Gogstad received disbursements slightly in excess of $86,000.00 [out] of a total of slightly more than $621,000.00 [citation]. Schmidt further declares that there is 'nothing in the Records to substantiate or justify these payments [citation].' Schmidt also provides a ledger of sizeable non-check withdrawals from RTI's account which follow large deposits into it [citation]. Even more particularly, Schmidt points to certain RTI transactions which involve disbursements to corporations and individuals which he declares have no relation to RTI's business, including (1) payment of certain credit card accounts not held by RTI, but by an unrelated business owned by Webb and Gogstad, [SOS] and (2) cash or cash-equivalent payments to a company owned by Webb's brother (Extreme Performance Products), but unrelated to RTI or its business [citation]. Moreover, Schmidt declares that an examination of the documents reveals (3) payments to Kingman Hospital involving payments for an accident involving Webb's father, and (4) a payment for an unspecified purpose to a relative of Webb [citation]." The court also discussed the failure to account for the proceeds of the shredder and Webb's apparent dissembling concerning the sale of the shredder at his examination.

The court found this evidence "sufficient to determine that Webb should be added . . . as a judgment debtor" because it established that Webb "converted funds owing to the corporation to his own use, and disbursed corporate funds to his personal advantage." The accounting set forth in Schmidt's declaration was "insufficient by itself to give rise to a finding that

Webb is RTI's alter-ego," but it was "persuasive when viewed in the context of the pattern of disbursements from RTI for the apparent benefit of Webb and his family." Although Webb's evidence, "effectively counter[ed] some of the asserted wrongdoing," the court was persuaded by "the sale of the Shredder and the disbursements on behalf of Webb's father, and the disbursements to [SOS]" that "it would be proper to find that there is a unity of interest and ownership . . . such that the separate personalities of RTI, IF and Webb do not exist." Further, "the evidence presented and the context of the matter as a whole suggests to the court that to recognize the legal fiction of RTI, IF and Webb would result in substantial injustice to Schmidt."

DISCUSSION

A. *Court's Power to Add Judgment Debtor and Standard of Review*

The trial court's power to amend a judgment to add an additional judgment debtor or debtors derives from Code of Civil Procedure section 187, which provides: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this [C]ode." (*Postal Instant Press, Inc. v. Kaswa Corp*. (2008) 162 Cal.App.4th 1510, 1517; *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd*. (1996) 41 Cal.App.4th 1551, 1554-1555.) Under this provision, "[j]udgments may be amended to add additional judgment debtors on the ground that a person or entity is the alter ego of the original judgment

debtor." (*Id.* at p. 1555.) The judgment may be amended "'at any time so that [it] will properly designate the real defendants.'" (*Ibid*.)

"The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 300.) There are two general requirements: "'(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.'" (*Ibid*., quoting *Automotriz etc. de California v. Resnick* (1957) 47 Cal.2d 792, 796; accord, *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777.) As the alter ego doctrine is equitable in nature, it is applied "only when the ends of justice [] require." (*Mesler v. Bragg Management Co*., *supra*, 39 Cal.3d at p. 301.) However, "[b]ecause it is founded on equitable principles, application of the alter ego 'is not made to depend upon prior decisions involving factual situations which appear to be similar. . . . "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case."' [Citations.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248, quoting *McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 853.)

Factors relevant to the existence of an alter ego relationship include the commingling of funds and other assets, the failure to separate the assets of separate entities, the treatment of the corporation's assets as those of an individual or other corporation, holding out that the individual or other corporation is personally liable for the first corporation's debts, the failure to maintain separate records or the commingling of the records of the entities,

identical equitable ownership in the two entities, the equitable owners' domination and control of the entities, the use of the same business location, the employment of the same employees, the use of the corporation as a mere shell or instrumentality for the conduct of the affairs of another entity, and the failure to maintain arm's length transactions between entities and the diversion of assets. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-840; see *Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 411.)

It has been said that, "while the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity." (*Associated Vendors, Inc. v. Oakland Meat Co.*, *supra*, 210 Cal.App.2d at p. 838.) It follows that the existence of an unsatisfied creditor is not sufficient in and of itself to establish inequity, and the plaintiff must prove more than that he or she is owed a debt by the corporation to justify piercing the corporate veil. "In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable . . . for the equitable owner of a corporation to hide behind its corporate veil." (*Id.* at p. 842; see also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539 [in the absence of evidence of wrongdoing or of injustice flowing from recognition of corporation's separate identity, alter ego doctrine cannot be invoked].)

The trial court determines whether the requirements for a finding of alter ego have been established, and its determination will not be disturbed on appeal if supported by substantial evidence. (*Jack Farenbaugh & Son v. Belmont Construction, Inc*. (1987) 194 Cal.App.3d 1023, 1032-1033; *Associated Vendors, Inc. v. Oakland Meat Co*., *supra*, 210 Cal.App.2d at p. 837.) An appellate court defers to factual determinations made by the trial court when the evidence is in conflict, whether the trial court's ruling is based on oral testimony or declarations. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

With these general principles in mind, we turn to Webb's contentions.

B. *Webb's Status at Time of Schmidt's Claim*

Webb's first contention is based on his status at the time RTI incurred the debt to Schmidt. Webb points out he did not take the position of RTI's president until the untimely death of his father in 2000, at which point the company was already essentially insolvent, with operations costing more than income. Although, the period at issue in Schmidt's salary claim was from June 1, 2001 to January 31, 2002, after Webb became president of RTI, Schmidt based his alter ego claim on actions undertaken between 2002 and 2004. Webb contends the determination of his status as an alter ego of RTI should have been based on when the claim accrued, rather than on the years that followed.

Webb cites no authority for the contention that the focus of the alter ego determination should be the period during which the debt was incurred, and we are aware of none. To the contrary, the determination is properly based on actions undertaken long after the obligation arose if substantial evidence supports that such actions were undertaken to avoid paying it.

(See, e.g., *Talbot v. Fresno-Pacific Corp*. (1960) 181 Cal.App.2d 425, 432 ["Equity will lift the corporate mask and identify the person behind it when a business corporation reorganizes under a new name, with practically the same stockholders and directors, to carry on the former business with the design of avoiding the liabilities of the original company"]; *Thomson v. L. C. Roney & Co*. (1952) 112 Cal.App.2d 420, 429-430 [where assets of debtor corporation transferred to second corporation, leaving debtor corporation unable to pay outstanding obligation to plaintiff, second corporation properly added as judgment debtor]; *Kohn v. Kohn* (1950) 95 Cal.App.2d 708, 717 [affirming finding that defendant was alter ego of corporation, where one purpose of forming corporation was to divert income and minimize payments to ex-wife].) Accordingly, the trial court did not err in basing its alter ego finding on Webb's more recent conduct.

C. *Webb's Interest in Defending Schmidt's Claim Against RTI*

Webb's second contention is based on his involvement in the defense of Schmidt's administrative claim against RTI. It is the rule that a party can be added as an additional judgment debtor "'only if the individual to be charged, personally or through a representative, had control of the [underlying] litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.'" (*NEC Electronics, Inc. v. Hurt, supra*, 208 Cal.App.3d at pp. 778-779, quoting Rest.2d, Judgments, § 59, p. 102.) Indeed, the Supreme Court has said that to add a nonparty to a judgment against a corporation where the party had no opportunity to litigate the underlying claim would "patently violate" due process. (*Motores De Mexicali v. Superior Court* (1958) 51 Cal.2d 172, 176.) Webb contends that imposing personal liability for Schmidt's claim

before the Labor Commissioner violated his due process rights. He claims he had no reason to contest the underlying dispute with "'diligence corresponding to the risk of personal liability that was involved'" because he was not named as a defendant in that proceeding, either individually or as an alter ego of RTI.

Webb misperceives the test for whether a party had reason to conduct the underlying litigation with sufficient diligence to justify imposition of liability on him or her. It is not based on the party being named a defendant or having foreknowledge that he or she would later be added as a judgment debtor. As explained in *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, a party may be properly be added as a judgment debtor via an alter ego theory as long as he or she had an *opportunity* to present a defense *through the vehicle of the corporation*. (*Id.* at p. 150; accord, *NEC Electronics, Inc. v. Hurt*, *supra*, 208 Cal.App.3d at p. 780 [in the "usual scenario . . . the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interest of the alter ego"]; see also *Mirabito v. San Francisco Dairy Co*. (1935) 8 Cal.App.2d 54, 60 [no reason to deny motion to add additional judgment debtor where "nothing appear[ed] in the record to show that [alter ego] could have produced a scintilla of evidence that would have in any way affected the results of the trial"].) The situations where courts have found that due process precludes adding an additional party as a judgment debtor at a later time -- the authorities on which Webb seeks to rely -- involved judgments obtained after the corporate defendant defaulted, and thus no defense of any kind was presented (*Motores De Mexicali v. Superior Court*, *supra*, 51 Cal.2d at p. 176; *NEC Electronics, Inc. v. Hurt*, *supra*, 208 Cal.App.3d at

pp. 780-781), or involved attempts to add individuals who had not controlled the underlying litigation (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581).

The record here reflects that the administrative hearing took place over the course of two days. On the first day, the parties litigated whether Schmidt was an employee of RTI and whether the company was in arrears on Schmidt's wages. Webb appeared at that hearing on behalf of RTI. A second day was scheduled to give RTI an opportunity to "verify the amount of wages paid" to Schmidt. RTI made no appearance on that day, but the significant evidence had already been presented; thus, as our prior opinion made clear, the order subsequently entered did not represent a default judgment. By appearing on behalf of RTI, Webb controlled the litigation. As president of RTI, his interest in preventing Schmidt from establishing a claim for unpaid wages was similar to RTI's. Webb identifies no additional evidence or defense that he would have presented had he known that he might someday be held personally liable. Accordingly, he had a full and fair opportunity to litigate Schmidt's underlying claim and could properly be bound by the results.

D. *Failure to Conduct an Evidentiary Hearing*

Webb contends the trial court was required to conduct an evidentiary hearing with oral testimony before amending to add a previously unnamed defendant as a judgment debtor. He asserts that conducting proceedings by way of oral testimony rather than through affidavits would have afforded him the opportunity to assert affirmative defenses such as unclean hands, offset and failure to mitigate. He further argues that the hearing should have encompassed not only issues related to alter ego and piercing the corporate veil, but also the validity of Schmidt's underlying claim for unpaid wages.

For the reasons discussed above, a party who had an opportunity to litigate the underlying claim through control of the corporation and its defense need not be afforded an opportunity to relitigate in the proceedings on a motion to amend the judgment. With respect to defenses, there was no restriction on Webb's ability to present any defense he believed to be available. With respect to presenting witnesses, Webb did not request to present oral testimony at the time of the original hearing in 2005. Our record of the proceedings after remand contains nothing except the transcript of the hearing, the court's ruling, and notices related to the appeal. Nothing indicates that prior to the hearing on the motion to amend, Webb requested an opportunity to present witnesses or cross-examine Schmidt's declarants. It was only after receiving the court's tentative ruling against Webb that counsel for Webb stated: "Clearly I would [sic, "should," we presume] at least have an opportunity to question Schmidt[,] where did he get his numbers[?]"

"'"No procedural principle is more familiar . . . than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]'" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *U.S. v. Olano* (1993) 507 U.S. 725, 731.) "[A]n appellant waives his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal. [Citations.]" (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) In addition, it is inappropriate to allow any party to "trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable." (*In re Urayna L.* (1999) 75

Cal.App.4th 883, 886.) Webb acquiesced in the procedures of the trial court until it appeared that he was in danger of defeat and only then suggested the need for an evidentiary hearing. By failing to make a timely request for presentation of oral testimony and opportunity for cross-examination, Webb forfeited any right he might have had to present such evidence.[13]

E. *Substantial Evidence*

Finally, Webb contends the trial court's alter ego determination is not supported by substantial evidence of wrongdoing or bad faith. Noting that the court expressly cited the sale of the shredder, the disbursement on behalf of Webb's father, and the disbursements to SOS as support for the ruling, Webb contends: (1) there is no evidence that the funds from the sale of the shredder were converted to Webb's use; in fact, the evidence established that they were eventually paid to Soris Financial; (2) the monies disbursed to the hospital were to avoid a claim against RTI by the passenger of the vehicle Raymond Webb had been driving on company business at the time of his death; and (3) the disbursement to SOS, even if invalid, was too insignificant a sum to justify imposition of the drastic remedy of piercing the corporate veil. In addition, Webb asserts that he and his wife invested $1.2 million in RTI, that he paid $265,000 in personal funds to settle a lawsuit brought by an RTI investor, and that he was garnished $16,000 by the IRS for unpaid

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13 We note, moreover, that even had Webb's request been timely, he has failed to show prejudice. Though he claimed an entitlement to know "where [Schmidt] g[o]t his numbers," that fact was known: Schmidt derived them from the documents produced by Webb in response to a subpoena for RTI's and IF's business and financial records. Moreover, Webb has failed to show that he was denied the right to present any defense he might have had. Finally, as noted above, Webb was not entitled to challenge the validity of Schmidt's underlying wage claim.

corporate taxes. Webb claims the evidence establishes only that he was "attempting as best he could to satisfy RTI's outstanding debts with its myriad secured creditors, judgment creditors, as well as [] pay outstanding tax obligations that had been incurred prior to Webb's appointment as the company's president . . . ."

With respect to the trial court's express reference to certain items of evidence, "[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "When the court announces its tentative decision, a party may, under [Code of Civil Procedure] section 632, request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which the party is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement. Thereafter, under section 634, the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. The section declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party." (*Ibid*, fns. omitted.) If, on the other hand, these procedures are not followed, "the appellate court will imply findings to support the judgment." (*Id*. at p. 1134.) "Stated otherwise, the doctrine [of implied findings] (1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner." (*SFPP v. Burlington Northern & Santa Fe Ry. Co*. (2004)

121 Cal.App.4th 452, 462.) Accordingly, although the trial court mentioned only specific factual findings that favored Schmidt, we may presume it made other findings in his favor as long as they are supported by substantial evidence and the written order does not preclude such findings.

Schmidt established that Webb used his control of RTI and IF to pay substantial sums to himself and his wife. Webb contended this was for repayment of sums owed to them by the entities. Although "'[a] debtor may pay one creditor in preference to another,'" "[o]ne who dominates and controls an insolvent corporation" may not "use his power to secure for himself an advantage over other creditors of the corporation." (*Commons v. Schine* (1973) 35 Cal.App.3d 141, 144, quoting Civ. Code, § 3432.) In other words, "directors of a corporation cannot secure to themselves any preference or advantage over the other creditors in the payment of their claims." (*Rankin v. Frebank Co*. (1975) 47 Cal.App.3d 75, 89; see also *Heim v. Jobes* (8th Cir. 1926) 14 F.2d 29, 34 ["The great weight of judicial authority supports the rule that, where a corporation is insolvent, its officers and directors must not use the assets of the corporation to prefer themselves as creditors to the prejudice of other general creditors."].) "In essence, the preference obtained for his personal benefit by a corporate controller-dominator is a species of fraud." (*Commons v. Schine*, *supra*, 35 Cal.App.3d at p. 145.) In the absence of clear evidence to the contrary, the court was justified in inferring that Webb was using his control of RTI and IF to unfairly pay debts owed to himself and his wife ahead of debts owed to other creditors such as Schmidt.

The court had already found that Webb controlled RTI and IF. Webb did not dispute that he and Gogstad received payments from these entities, but contended the sums paid were for "reimbursement" of "expenses."

However, the opposition identified only a limited number of expenses paid by Gogstad. Webb did not identify the expenses he had paid and for which he was entitled to reimbursement, with the exception of the payment to the accountant -- which Maidenberg denied had been on behalf of RTI. Nor did Webb explain why reimbursement to him and Gogstad was appropriate ahead of the other creditors who remained to be paid. Moreover, Webb essentially concedes that the payment to the SOS credit card was inappropriate and that he lied about the sale of the shredder. Thus, even if the trial court did not credit the entirety of Schmidt's declaration with respect to funds not accounted for, the record supports the court's finding that Webb was the alter ego of RTI and had used the corporate form unjustly and in derogation of Schmidt's interests.

DISPOSITION

The order amending the judgment is affirmed. Respondent Schmidt is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.